statement, but -- I wasn't listening to every word, but I was listening to the ones that caught my attention, and "misappropriated" was one that I enjoyed, because he said Universal entered into this covenant not to sue with Coleco, it misappropriated, and this was unjust enrichment.

What did he leave out of the sentence? The direct object. Misappropriated what? Well, the fact of the matter is they can't claim we misappropriated anything. And if your Honor wants to see their slight of hand, their ledger domain, look at their complaint -- I mean, their counter claims and see the way they pleaded it. Then look at our first brief -- when I say our first brief, we have submitted two, one for a summary judgment, one responding to their trial brief -- and then look at their trial brief after we argue.

They changed it all around and they came up with this very ingenious 14th century derivative of unjust enrichment, because that's all they had. And what really shot them dead was the testimony of Mr. Greenberg of Coleco, because they went into this making the claim that because Universal signed a covenant not to sue with Coleco, Coleco's pricing of the Donkey Kong cartridges that it was selling and its pricing of the Donkey Kong table top game had to change, and this affected their rights.

That was their theory. Mr. Greenberg said no,



SOUTHERN DISTRICT REPORTERS. U.S. COURTHOUSE
FOLEY SQUARE. NEW YORK. N.Y. – 791-1020

our prices were well in advance, our pricing was only changed in response to marketing conditions like everyone else, had nothing to do with that. Boom, that's the end of that theory, they've got to come up with something else.

They came up with a good theory except a real problem. It's based on a false factual proposition, that Universal misappropriated Donkey Kong, and also a legal proposition runs into real difficulties which, your Honor, begins to focus -- if he ever does, and I hope he does not -- on the proposition, how do you impair a trademark copyright other than by infringing them?

You can read all the cases you want, you do not find the concept of impairment of trademark, and the only concept of impairment of copyright is when you license someone and they fail to put the copyright notice. Something like that, throws it into public domain. That is impairment of a copyright, the old statute. The one that was succeeded by the 1976 account had the word "impairment," and that's what it refers to, things that licensees could do or owners could do. That was impairment. I have never read a case where there was impairment of a copyright or a trademark in the way these people are using it in this case. If your Honor wants to make new law on that you will have the opportunity, I suppose, but there is no such holding.

As far as misappropriation is concerned, let me

just say this. Our second brief says about all I am capable of saying here. I have a case, it was decided at the same time that these people or shortly before these people began -- when I say "these people," I now mean my own people, Universal -- began licensing King Kong and exploiting their King Kong rights, and it was with Jaws.

I've got a court that uses the exact same language -- misappropriating Universal rights in Jaws. And another infamous character you've heard, a witness in that, he was familiar with the case, and if Mr. Kirby doesn't know what misappropriation of merchandizing rights are, at least people at Universal knew and at least the people at Ruby Spears knew as well, it's in the same contract that Nintendo has with Ruby Spears. You'll see the terms, misappropriation of merchandizing rights.

The concept is merchandizing rights. Mr. Kirby is going to cross-question all of these witnesses about what they think they mean by it. They are all lawyers and we will have lot of fun at that. That's what he does with Mr. Sheinberg for page upon page upon page, and if that's probative evidence to your Honor, so be it, I don't see how it is. It's the cases that make that, that's law and Mr. Kirby can't change it. It doesn't make any difference whether he likes it or not. There is a concept of merchandizing rights, people know what it's about, and when


SOUTHERN DISTRICT REPORTERS. U.S. COURTHOUSE
FOLEY SQUARE. NEW YORK. N.Y. – 791-1020

A. My first involvement was in June of 1981 when I met Mr. Arakawa, the president of Nintendo of America in my offices at Sax & MacIver.

Q. Was Mr. Arakawa there in connection with retaining you?

A. Yes, he retained me and my law firm to represent Nintendo.

Q. Now, at the time you were first retained by Nintendo of America by Mr. Arakawa, can you describe Nintendo of America for the court?

A. It was a very small company. Originally it had -- Nintendo of America had been incorporated in New York State and it was located here in the city. That was in April 1980. In the spring of 1981 Mr. Arakawa moved the headquarters of Nintendo of America to the Seattle area. At that point in time the company was engaged in the assembly and sale in the United States of arcade video games.

Q. Now, do I understand correctly that Nintendo of America is a subsidiary of a Japanese company, Nintendo Company, Ltd.?

A. Yes, it is. It's a subsidiary of Nintendo Company, Ltd., of Kyoto, Japan.

Q. And would you describe Nintendo Company, Ltd., at the time you were retained by Mr. Arakawa?

A. Nintendo Company, Ltd., is a fairly large Japanese corporation that's been in existence since 1899. It's been in the -- it's manufactured cards, it's been in the toy and game business. In the 1970s it entered the video game business.

Q. Now, Mr. Lincoln, I am going to ask you to describe in very general terms your relationship with Nintendo of America from the time you were first retained by Mr. Arakawa in June of '81 until January of 1983 when you resigned from Sax & MacIver and became executive vice-president and general counsel of Nintendo of America.

A. Originally I was asked by Mr. Arakawa to assist in obtaining trademark and copyright counsel. The company was about to introduce Donkey Kong. In fact, that was my -- at my first meeting he told me about the Donkey Kong game. Throughout the rest of 1981, I performed general legal matters. In the winter of '81 I started getting involved with licensing. Mr. Arakawa asked me to prepare the license agreement between Coleco and Nintendo.

In 1982, at the beginning of '82 I began -- became heavily involved in merchandise licensing as well as other legal matters. By 1982 I was virtually working for Mr. Arakawa and for Nintendo full-time. That continued until the end of 1982 when I joined the company.

Q. Now, Mr. Lincoln, you said that in June of '81

when you first met Mr. Arakawa, in that period, Nintendo of America was a very small company. Would you tell the court what the fiscal year 1981 revenues for Nintendo of America were and its earnings?

A. The fiscal year end is August 31st. The fiscal year end August 31, 1981, the company's sales were about $4.7 million, its revenues about $64,000.

Q. Now, in July of 1981, Donkey Kong was introduced into the United States; is that correct?

A. It was really August of '81.

Q. August of '81. What were the earnings of Nintendo of America for the fiscal year ending August of 1982?

A. It was $111 million in sales and $25 million in -- excuse me, $22 million in revenues.

Q. In earnings?

A. In earnings, excuse me.

Q. Now, Mr. Lincoln, prior to Donkey Kong's introduction in the United States, had it been introduced in Japan?

A. Yes.

Q. Can you tell me approximately how long before its August '81 introduction in the United States?

A. It would have been June or July of 1981 that the game would have been introduced in Japan.

Q. Now, with respect to the Donkey Kong game that was introduced originally by Nintendo, was that a video arcade game?

A. Yes.

Q. And is that the video arcade game that is in the courtroom today?

A. That's it.

Q. Now, can you describe the sales history of Nintendo of America of Donkey Kong video arcade games in the United States?

A. The game was introduced in the U.S. in August of '81, and August and September the sales were 300 to 400 units a month. The game really took off in October of '81. I believe there was almost 4,000 games sold that month, and then it went up from there. In the spring of '82 they were selling up to 7,000 units a month. For example, in June of '82, I think it was 7,000 units, in that area. Total sales of the Donkey Kong arcade game were 58,000 units. That's of the uprights and of the table, the cocktail table models.

Q. And that's in North America?

A. U.S. and Canada, yes.

Q. Now, Mr. Lincoln, what you have just been telling us are Nintendo's sales, presumptively to its distributors?

A. Yes.

Q. Who then resell to place in arcade locations?

A. Yes. The way the business works is that Nintendo is a manufacturer, sells -- like other arcade video game manufactures, sells to a group of distributors and various locations in the U.S. and Canada. Those distributors in turn sell to operators who place the games either in arcades or in street locations.

Q. Mr. Lincoln, is there an available measure to show Donkey Kong's popularity in terms of the consumer?

A. The real measure of a video game is how many quarters go into it on a weekly basis, that's what the business is all about. Both Nintendo and other manufacturers keep an eye on the coin drop or the collections of quarters, and there is some reporting of the popularity of video games in trade magazines such as Replay, and the other magazine is Playmeter.

Q. Where does Donkey Kong stand in these reports in terms of consumer playing, coin drop, as you say?

A. For Replay it was in the top ten between November of '81 and January of '83, which is a very good run. In Playmeter it was No. 1 January through April, but the game was in the top ten with Playmeter through '82 and '83, too.

Q. Is it fair to say that Donkey Kong was one of the most popular video arcade games ever introduced?

A. It was the most popular arcade game ever introduced with the exception of Pac Man.

Q. Now, did there come a time, Mr. Lincoln, when Nintendo entered into an agreement to license a home video game?

A. Yes.

Q. When was that?

A. The oral agreement between Nintendo and Coleco was in November of 1981. The license agreement itself was signed in February, February 1 of '82.

Q. Now, at the time that Nintendo was entering into the oral agreement with Coleco, what did Nintendo know about Coleco's plans for Donkey Kong?

A. We knew that Coleco was about to introduce a home video system called Colecovision that would be competing with Atari and Mattel's Intellivision. And we knew that their plans were to pack in the Donkey Kong cartridge and to introduce the Colecovision unit with the Donkey Kong cartridge. Those plans were announced by Coleco in the trade press, also at the consumer electronics show in January of '82 and at Toy Fair here in New York in February of '82.

Q. Did the consummation of the license between Coleco and Nintendo and the various public announcements you have just testified to have any affect on the business

Q. And who represented Universal at that meeting?

A. Mr. Hadl, and I met an outside counsel, Mr. Kroft.

Q. And was Coleco present at that meeting?

A. Yes. I met Mr. Schwefel and Mr. Fred Yerman, who was with the Kaye Scholar firm, outside counsel to Coleco.

Q. By the way, prior to that May 6 meeting, had you ever met Mr. Schwefel before?

A. I had never met him and I never talked to him.

Q. Prior to the arrangements for that meeting?

A. Right.

Q. Now, I take it, therefore, that prior to the meeting at Universal's headquarters, was it?

A. It was at Universal City on the Universal City Studios lot.

Q. Did Nintendo have any private meeting with Coleco?

A. No.

Q. When you arrived, when you and the other Nintendo representatives arrived at Universal, were the representatives of Coleco already there?

A. Yes, they were in Mr. Hadl's office.

Q. And who is Mr. Hadl, by the way?

A. Robert Hadl, he is an executive with Universal.

I don't know his title.

Q. Now, Mr. Lincoln, just so we can have some time parameter on this, from the time the meeting came to order when Universal, Coleco and Nintendo representatives were all there, until the time the meeting finally broke up, about how much time elapsed?

A. It was about an hour-and-a-half meeting.

Q. Were you in continuous session with Mr. Hadl and Mr. Kroft?

A. No. There was a short meeting with everyone, Nintendo and Coleco and Universal people. Then there was an adjournment where we met the Nintendo people and the Coleco people met, and then there was a further meeting back in Mr. Hadl's office with everyone present.

Q. Now, focusing just on that first segment of the meeting when everyone was together prior to the time Coleco and Nintendo met privately, will you please tell the court what transpired.

A. We went into Mr. Hadl's office. He introduced Mr. Kroft. Mr. Hadl began by commenting that, of course, we all knew why we are there, that Universal had sent this telex out, that it owned the rights in King Kong, that it considered the Donkey Kong game to be an infringement of those rights.

He made a comment that, "As you well know, I am

sure know, Universal is very litigious, but in this matter, we would like to see if we can get this resolved and settled and we would propose that Nintendo and Coleco pay a seven percent royalty." After he got through saying that, my partner, Mr. McGee, asked him a few questions, and the one that I remember is, "Well, Mr. Hadl, is this a copyright claim or a trademark claim?" He said, "Well, it's a trademark claim, it really isn't -- we are not claiming any -- that there is any copyright violation, but I want to reserve that," and that was understood.

At that point I said to Mr. Hadl that perhaps it would be productive if representatives of Nintendo and Coleco adjourn and discussed what Mr. Hadl had said, and he agreed to that.

Q. And I take it you then did adjourn as you previously testified?

A. We went to the office next door, yes.

Q. Were the same people you previously identified as representing Coleco and Nintendo present at that private meeting?

A. Yes.

Q. What was discussed at that meeting?

A. Well, Mr. Schwefel made it very clear that Coleco wanted to settle this thing on the spot, that they were very, very concerned about it, that they were just

about ready to introduce Colecovision. He was under a lot of pressure, and he expressed a very firm conviction that he wanted to settle. He said, "I've got my checkbook and I can't go back to Hartford, I want to get this thing settled."

I said, "Look, this thing is really perplexing. I am not going to settle this claim until we find out what it is that they own. We have done some work, we have looked at these trademark searches and everything and we just don't know what it is that they own, and even if they owned something, I don't understand how this Donkey Kong game can infringe on King Kong."

So I said, "Look, before we talk about settlement, why don't we go back in there and let me say to Hadl that we can't talk about settlement until we get some evidence of what their rights were."

So we agreed to do that. We went back into Hadl's office.

Q. Now, when you returned to Mr. Hadl's office, was Mr. Kroft still there?

A. Yes.

Q. Now, how long were you back in Mr. Hadl's office after the return?

A. Not too long, about 15 minutes.

Q. Who reported on the private meeting?

A. I did.

Q. What did you say and what transpired at that 15-minute session about what you are now testifying?

A. I said that we -- Mr. Hadl, that we had a very productive meeting with Coleco but that we really had a problem and it was premature to discuss settlement until we had evidence, could see some evidence of what it was that Universal owned in King Kong and also how the Donkey Kong game could possibly infringe. I said we were particularly interested in getting some explanation of what Universal's rights were in King Kong.

He said, "Well, you know, we own all of the rights. The matter is open and shut." I said, "Well, look, what I would like is I would like a chain of title, a title report." And he looked at me like some kind of a rube or something and said, "Well, you what?" I said "I want a chain of title." He said, "Well, I will give you an indemnification, indemnify you and Coleco." I said, "I do not want an indemnification, I want a chain of title. I don't want to buy the Brooklyn bridge." And he and Kroft looked at me, and finally Mr. Hadl said, "Well, all right. Mr. Kroft here will send you your chain of title." I said, "Thank you."

That's basically what happened.

Q. What did you understand him to mean when he said he would give you an indemnification?



SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

A. Just that he would indemnify and hold Nintendo harmless from the claims of anybody else in King Kong. That's what I understood it to mean.

Q. Now, immediately after that meeting, did you receive a chain of title laying out Universal's rights in King Kong from Mr. Kroft or Mr. Hadl?

A. No.

Q. Did you ever receive a chain of title he said he would send to you?

A. No.

Q. During the course of either the first or second portion of that meeting, did Hadl or Kroft describe any source for Universal's rights in King Kong?

A. The only thing I recall is that they said they owned King Kong. They owned the rights, all of the rights. I don't recall them indicating any source for those rights.

Q. Did they say that they owned the movies?

A. Just said they own everything. That's why I asked for the chain of title. I was quite frankly suspicious of that.

Q. Now, Mr. Lincoln, you remember that in the telex they -- this is Plaintiff's Exhibit 14 for identification. On the third line -- second line, excuse me, Universal says that it's the sole and exclusive owner of all rights, and then it says "except book publishing rights." Did they in


SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

the meeting tell you that they didn't own book publishing rights?

A. No, we didn't -- the only discussion that I recall of the telex was simply Mr. Hadl referring to it at the outset of the meeting, you know, "We are here because we sent you a telex."

Q. Well, during the course of the meeting, did they state any limitation on Universal's rights, book publishing or otherwise?

A. No.

Q. Now, after the meeting broke up in Mr. Hadl's office, did you immediately leave Universal City studios?

A. No. At the conclusion of the meeting with in Mr. Hadl's office Mr. Hadl said that he would like Mr. Arakawa and me to meet Mr. Adler who was an officer of Universal involved in merchandising, and he would like to have us have a discussion with Mr. Adler concerning the possibility of maybe Nintendo acquiring some of the Universal properties for video games.

So Mr. Arakawa and I accompanied Mr. Adler to another floor of the -- in the building, and we had that discussion with him.

Q. And briefly, what transpired in the meeting with Mr. Adler?

A. Oh, Mr. Adler indicated that Universal had a



SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. – 791-1020

it was a table top game at that point, and I said, "Schwefel says that this is a knock-off of -- it's a Tiger King Kong game and it's a knock-off of Donkey Kong." And he said yes, Tiger was a licensee of Universal, they licensed them in September of '81 to do the -- to do a King Kong video game. He said that this had been Mr. Adler's responsibility and that Adler had not properly monitored it or followed it, that when Universal had received a catalog or a brochure or something to that effect they had made a determination that it was a knock-off of the Donkey Kong copyright, and he said that Mr. Sheinberg had hit the roof -- those were his words -- and that Universal had cancelled the Tiger license. So that was about it.

Q. Did he tell you the status of the title report?

A. No.

Q. Did he mention that he wasn't going to send it to you?

A. No.

Q. When was your next conversation with Mr. Hadl?

A. He called later that week, I believe it was the 17th of May, and he said that he was getting pressure to file a lawsuit from -- by his management. He asked me if I had talked to Mr. Arakawa about the proposals that he had made, and I said that we -- that I had talked to Mr. Arakawa. He said, "Well, we've got to get this thing

resolved." I believe I said, "Well, we are certainly willing. Mr. Arakawa is willing to sit down with you and we will come down to Los Angeles and sit back down with you and discuss it." He said, "Fine." And we set up a meeting for the 21st in Los Angeles.

Q. All right. Now, between May 17th and the meeting on May 21st, did you have any other telephone conversation with Mr. Hadl?

A. He called me the next day to say that Mr. Sheinberg, the president of MCA, would be joining our meeting, our luncheon meeting. He said, "You know, I hope that you people come down with something that's specific and something concrete to offer to dispose of the claim." I said that we would come to Los Angeles. We did.

Q. Was that the first time that Mr. Sheinberg's name had come up in connection with Universal's claim?

A. The first time I heard about Mr. Sheinberg was at the May 6 meeting in Mr. Hadl's office.

Q. And in what connection was his name brought up?

A. I was just -- before we sat down I -- Mr. Hadl's office has a sweeping view of the, I guess it's the San Fernando Valley, I'm not sure, whatever valley is down there, and there were some buildings which were obviously movie studios. You could also look down on the Universal studios which were quite impressive. And I said, "Well,



SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. – 791-1020

what's that over there?" He said, "Oh, that's Warner Communication or Warner Brothers."

He said, "My brothers, Mr. Sheinberg and Mr. Ross," who I knew was the chairman of Warner Communications, they play golf or they do something together, "and Mr. Sheinberg is very jealous of Mr. -- of Warners because they have made a lot of money in the arcade" -- or excuse me, "in the video game business."

So he then said -- and I think he was just really passing the time of day -- he said, "So, you know, we are really very interested in this business, because the business was exploding at that point in time." So that was when I first learned about Mr. Sheinberg. So when he called me, I knew who Mr. Sheinberg was.

Q. Now, did you in fact have the meeting on May 21st?

A. Oh, yes. yes, we did.

Q. Where was that meeting?

A. It was in the private dining room on the Universal City studios lot.

Q. Who was there?

A. Mr. Arakawa and I flew down. We met Mr. Hadl in his office. We walked across the lot to the dining room. Then we waited a few minutes and we were joined by Mr. Sheinberg. We had lunch with the two of them.

Q. How long did that luncheon last?

A. It was about an hour.

Q. Now, will you tell the court what transpired during lunch.

A. Mr. Sheinberg asked me to tell him about Nintendo, and I explained what -- something about Nintendo, who they were. We then got into a discussion of the video game business, and he was interested in the business that we were in. We may have talked about Atari and Warners and other companies in the business. He then said, "Well, this is a really very serious matter. We've got this claim against you and we've got to get it resolved." I said, "I know that." And he said, "I hope that you don't misunderstand when we say we want to try to settle this because," he said, "your company or your client is a Japanese corporation, and I hope they don't have a misunderstanding like the fellow that I had a meeting with who was the president of Sony," and he mentioned the Beta Max case which was then before the Supreme Court.

Then we proceeded on with the lunch, and when lunch was over I said -- or Mr. Sheinberg said, "Do you have anything to report?" I said, "Yes, I do." I said, "We have decided not to pay you anything." I said, "Let me explain why." I said, "When we got this telex we were very concerned, so we went back and we checked and rechecked our

homework, we looked at the -- both the trademark search that we had done in Japan, we looked at the search that we had done in the United States, we looked at the opinion letter that we had received from outside counsel." I said, "After the telex came we did a search report for King Kong, we reviewed that. We engaged trademark counsel in New York City, asked them to review the matter and had come to the conclusion that we didn't think that we had done anything wrong and that we had some real question about Universal's rights."

So I said, "Mr. Sheinberg, because I don't think we did anything wrong here, we aren't going to pay you any money. However, Mr. Yamauchi and Mr. Arakawa are very interested in exploring business and we are prepared to proceed on that right away. Mr. Hadl has mentioned a joint venture and a movie and this and that. We are very interested in that. We are also interested in the properties that Universal has and the titles, etc., for video games." And I said, "I am not asking that you dismiss your claim," I said, "if you will just shelve it for a month or so, just put it aside while we explore whether we can do business together, then we can do business together, maybe we can resolve the claim that way."

Mr. Sheinberg said, "I don't understand why you came all the way down here to tell me that." And I said,



SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. – 791-1020

"Well, I came down to tell you that we hadn't done anything wrong and I wanted to explain why we felt that we hadn't done anything wrong." And he said, "Well, you better start saving your money for attorneys' fees," pushed back his chair and stood up. At that point the meeting adjourned.

Q. As the meeting was adjourning, did you have any further conversation with Mr. Sheinberg?

A. He asked me, he said, "Are you and Mr. Arakawa going back to Seattle?" And I said, "Well, I've got to go up and get my briefcase in Mr. Hadl's office and I wanted to talk to him for just a minute about Tiger." And Mr. Sheinberg said, "Well, I don't want you talking to Hadl, Mr. Hadl about Tiger because we've got some surprises in store for you on Tiger." At that point we walked out the door and walked across the lot back up the elevator, and that's the last time I have seen Mr. Sheinberg.

Q. Now, the lawsuit in this action was filed on -- excuse me, strike that.

Mr. Lincoln, at any time during the course of that conversation did Mr. Sheinberg describe his litigation department at Universal?

A. Yes, he said that -- I think that was pretty much at the outset of the conversation. He made -- he basically said the same thing that Hadl had told me, which was that Universal has -- you know, is very litigious, and

he made the comment that Universal's litigation department turned a profit or was a profit center or something to that --

Q. Now, between the May 21 meeting and the June 29 filing of the lawsuit in this matter, did you have any further conversations with Hadl or any other Universal representative?

A. I think it was on the 16th of June -- I've got to tell you, Mr. Kirby, I can't see that, so -- it's kind of blurry -- but it was the 16th of June.

Q. All right. That is the next date, the chart reflects a conversation. Did you call him or did he call you on the 16th of June?

A. He called me. He said that they were getting ready to file their lawsuit. And he told me that -- that Universal had entered into a settlement agreement with Coleco under which Coleco was going -- he just said that under this agreement, Coleco was going to be paying Universal three percent of the sales of the Donkey Kong video game, and he commented that he thought that the settlement agreement would hurt Nintendo. And I think he, again, as he did in all of our phone conversations, urged us to settle, kept saying, you know, "We want to get this thing settled but we are getting closer and closer to litigation." So that was the -- that was the June 16 phone


SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. – 791-1020

Q. Did Nintendo ever inform a licensee that the proposed art work or product would have to be redesigned?

A. Occasionally that happened.

Q. Were each of the Nintendo licensees required to indicate anything with respect to Nintendo on their product?

A. They had to indicate that Donkey Kong was a trademark of Nintendo of America, and we also asked them in certain cases to put a Nintendo copyright mark on the product.

Q. Mr. Lincoln, have you heard of a company called Union Underwear?

A. Yes.

Q. What does Union Underwear make?

A. They -- I have a list of these licensees, Mr. Fairhurst.

MR. FAIRHURST: Just so long as I know what it is the witness is referring to. He is now referring to some notes and I have not seen the notes, and if he is going to be questioned about that, are they going to be used to refresh his recollection? I would just like to see it.

Q. What does Union Underwear make, Mr. Lincoln?

A. They manufacture T shirts, I think the word in the trade is knit tops, under the Fruit of the Loom and BVD labels.

Q. At the time of the announcement of the Universal lawsuit against Nintendo, did Nintendo have a license agreement with Union Underwear?

A. No.

Q. Had there been any discussions between Nintendo and Union Underwear about a license?

A. Yes. We had had discussions with Union Underwear going back to March of 1982. We had received product samples, we had approved the product sample or the product. The only thing we hadn't gotten around to was finalizing the license agreement.

Q. Had an agreement been reached on the guaranteed royalty provision?

A. Yes.

Q. And what was the amount of the guaranteed royalty?

A. $40,000.

Q. Was the agreement between Union Underwear and Nintendo ever executed?

A. No.

Q. Why was it not executed?

MR. FAIRHURST: Objection.

THE COURT: Overruled.

A. In early July of '82 I had the license agreement, the draft license agreement in my office. I received a

phone call from the Union Underwear attorney indicating that the attorney indicated that she was aware of the litigation. I briefly explained the litigation and said that we would add an indemnification clause indemnifying Union Underwear against any claims that Universal might assert. She said that was fine.

A day or so later I got a phone call from the general counsel of Union Underwear indicating that they had decided not to proceed with the license because of the litigation. She said that they would rather wait the outcome of the litigation, and she asked me to send the license agreement back, which I did.

Q. Did Union Underwear and Nintendo ever enter into a license with respect to Donkey Kong?

A. No.

Q. Are you familiar with a company called Gabriel Industries?

A. Yes.

Q. What do they produce?

A. They make a squeeze toy.

Q. At the time the Universal lawsuit was filed, did Gabriel have a license with Nintendo with respect to Donkey Kong products?

A. No, like Union Underwear, we were in the process of negotiating that license.



SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

Q. Approximately how long had you been in negotiations with Gabriel Industries?

A. My recollection is it was several months. But I am not positive of that, Mr. Kirby. I know that we had gotten to the point of preparing license documents which would indicate to me that this license had gone through Mr. Gershin and had also -- there had been some discussions at Nintendo with respect to the license.

Q. Had you reached an agreement on the guaranteed royalty provision?

A. That we had.

Q. And what was the amount of the guaranteed royalty of Gabriel Industries?

A. $20,000.

Q. Did Gabriel execute a license agreement with Nintendo?

A. No.

Q. Did they refuse to execute a license agreement with Nintendo?

A. They did.

MR. KIRBY: Your Honor, I am going to be referring to certain exhibits in evidence. I am now going to show the witness Plaintiff's Exhibit 28 which was cross-designated and offered by us.

Q. Would you please look at Plaintiff's Exhibit 28

in evidence, Mr. Lincoln, and tell me if you can identify that letter.

A. I can identify it. It was -- a copy came to me.

Q. And did you receive that copy at or about the time the letter was written?

A. Yes.

Q. Would you read the first two paragraphs of that letter?

A. The letter is addressed to Bob Gershin. "Dear Bobby. Due to the current trademark infringement suit pending on the Donkey Kong name, our legal counsel has advised us not to pursue this property further. Therefore, we will not proceed to manufacture a Donkey Kong squeeze toy."

Q. Did you personally have any conversations with anyone from Gabriel regarding their decision not to proceed with the license for Nintendo?

A. That I don't recall.

Q. At any time subsequent to your receipt of this letter, did Nintendo and Gabriel reach an agreement on the Donkey Kong license?

A. No.

Q. During the months immediately after the Universal lawsuit was filed, did it come to your attention that any of Nintendo's licensees had been contacted by



SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. – 791-1020

A. I wasn't including Coleco.

Q. During the period June 29, 1982, through January 3, 1983, did any Nintendo licensee fail to honor its agreement with Nintendo?

A. To December --

Q. Through January 3, 1983.

A. No.

Q. After January 3, 1983, you testified some Nintendo licensees failed to carry out their license?

A. That's correct.

Q. Can you tell me approximately how many told Nintendo that they were not going to continue with their license?

A. Well, I have seven on my list, but -- and those are the ones that clearly told us that.

Q. Are you familiar with the company called Trim Line?

A. Yes.

Q. Was Trim Line a Nintendo licensee on January 3, 1983?

A. Yes, they were.

Q. When type of products does Trim Line produce?

A. Donkey Kong belts.

Q. Did Trim Line take any action after January 3, 1983 with respect to its Nintendo license?



SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. – 791-1020

A. They did, they ceased production.

Q. Let me show you what has been introduced into evidence as Plaintiff's Exhibit 33, which is a letter from a law firm, Honig & Smerling addressed to Nintendo America, dated January 7, 1983, showing a cc to Howard C. Lincoln, Esq. Did that letter come to your attention sometime on or about January 7, 1983?

A. Yes.

Q. Now, Mr. Lincoln, did you respond to that letter?

A. I recall that I did, yes.

Q. How did you respond to that letter?

A. I wrote their attorney, Mr. Honig.

MR. KIRBY: And that is in evidence as Defendant's Exhibit 30, your Honor.

Q. In that letter, did you urge Trim Line to continue producing Donkey Kong products?

A. Yes, I believe I did.

Q. After that letter, did Trim Line continue to produce Donkey Kong products?

A. No.

Q. Does Trim Line continue to pay royalties to Nintendo?

A. No.

Q. Does Trim Line still owe Nintendo royalties under the guaranteed royalty provision of its agreement?

A. They owe us $10,000.

Q. Are you familiar with the company called Charleston Hosiery?

A. Yes.

Q. Was Charleston Hosiery a licensee of Nintendo on January 3, 1983?

A. Yes, it was.

Q. What products did Charleston Hosiery produce under its license with Nintendo?

A. Donkey Kong socks.

Q. Did they take any action with respect to their license with Nintendo after January 3, 1983?

A. They ceased -- they advised us that they were going to cease production and sale of socks.

Q. Let me give you, Mr. Lincoln, what is in evidence as Defendant's Exhibit 33 which is a letter from Charleston Hosiery addressed to a Ms. O'Neil at Mudge, Rose showing copies of Nintendo of America and Susan Schoenecker dated January 19, 1983. Did this letter come to your attention on or about the time it was sent by Charleston Hosiery?

A. Yes, it did.

Q. Would you please read the first three paragraphs of that letter.

A. "Dear Ms. O'Neil. We are in receipt and



SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

appreciate your letter of January 13 offering to indemnify us against any legal action that might be taken against us by Universal City studios. As you can see from the attached wire, they have threatened to take action against us. We greatly appreciate the fact that Nintendo of America is doing what they are to protect us, but threat of suit is the least of our worries." Do you want me to keep reading?

Q. Yes, continue.

A. "The main problem is the fact that the customers are aware of the impending litigation and as a result have elected not to purchase our merchandise for fear of getting involved. As a result, this has put a real crimp in our ability to sell Donkey Kong socks. We look forward to discussing this problem with the people at Nintendo."

Q. After you received this letter, did Nintendo seek to retain Charleston Hosiery as a licensee?

A. Yes, we did.

MR. KIRBY: Your Honor, for purposes of the record, in evidence there are letters marked Defendant's Exhibit 34 and Plaintiff's Exhibit 47.

Q. What was Charleston Hosiery's response?

A. They responded that -- that they were unable to sell in the product, and ultimately when we asked them or we proposed to them that we would be willing to retain the



SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

license for another year so they can work off their guarantee, they said that while they appreciated that, that that wasn't going to help them out. By then I think they indicated it was just too late.

Q. Let me show you, Mr. Lincoln, what is in evidence as Defendant's Exhibit 35 which is a letter from Charleston Hosiery to Susan Schoenecker of Nintendo of America dated January 6, 1984. Did you see a copy of that letter?

A. Yes.

Q. At or about the time it was received by Nintendo?

A. Yes.

Q. Would you please read the second paragraph of that letter.

A. "We also have the agreements that clearly indemnify us relative to the threatened lawsuits over the name Donkey Kong. The trouble with these two documents is that they are after the fact. The threatened lawsuits did their damage at a time when there was interest in Donkey Kong and when we expected to sell the merchandise. As you know, time is everything in sales, and once that period of time expired and once our potential customers had been temporarily scared off, the ability to reassure them that there would be no problems went to little avail."

Q. Mr. Lincoln, did Charleston Hosiery continue to



THERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

produce products under its license with Nintendo?

A. No, they didn't.

Q. Did Charleston Hosiery ever pay the balance of the royalties owed under the guaranteed royalty provisions of its license?

A. No.

Q. How much does Charleston Hosiery owe Nintendo?

A. $7500.

Q. Are you familiar with the company called Bates Night Wear?

A. Yes.

Q. Was Bates Night Wear a Nintendo licensee in January of 1983?

A. Yes.

Q. What type products did Bates Night Wear produce under its license with Nintendo?

A. Donkey Kong sleepwear.

Q. Did Bates Night Wear take any action after January 3, 1983 with respect to its Nintendo license?

A. They ceased production of any further goods and they advised us that they were holding in escrow $800 that was due us under the license agreement.

Q. Did Bates Night Wear produce any further products under its Donkey Kong license to your knowledge?

A. No.



SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

Q. Did Bates Night Wear eventually pay the $800 in royalties due Nintendo that they said they were holding in escrow?

A. Yes, they did.

Q. Do they continue to be a licensee of Nintendo's?

A. No.

Q. Are you familiar with the company called Super Shirts?

A. Yes.

Q. Was Super Shirts a Nintendo licensee on January 3, 1983?

A. Yes.

Q. What type of products did Super Shirts produce under its license from Nintendo?

A. T shirts.

Q. Did Super Shirts take any action after January 3, '83, with respect to its Nintendo license?

A. They cease the production of T shirts, and I recall that they advised us that they informed their sales force not to solicit any further orders.

Q. Let me show you what is in evidence as Defendant's Exhibit 24, which is a letter from John C. Bates of Super Shirts to Howard C. Lincoln dated January 29th, 1983. Mr. Lincoln, did you see that letter at or about the time it was sent?

A. Yes.

Q. Would you please read the second and third paragraphs of that letter.

A. "Dear Howard. First, due to the nature of our clientele, Super Shirts cannot afford to be associated with products with respect to which there is any questions about our right to manufacture and distribute. The good will we have developed with our customers is too important to jeopardize by dealing in such products.

"Second, we are extremely disturbed that we were not informed of the pending litigation before our licensing agreement became effective and we began marketing Donkey Kong products in July. Obviously, had we been aware of the situation we would not have gone forward with the licensing arrangement."

Q. Did Nintendo make any effort to retain Super Shirts as a licensee for Donkey Kong products?

A. I wrote Mr. Bates a response to this letter and tried to explain that we had entered into a license with him or with his company before the litigation had commenced and urged him to continue with the license.

Q. Let me show you what is in evidence as Defendant's Exhibit 25, which is a letter dated April 18, 1983, from Mr. Bates addressed to you. Did that letter come to your attention at or about the time it was sent?

A. Yes.

Q. Would you please read the first three paragraphs of that letter.

A. "Dear Howard. Regarding your letter of February 3, 1983, on January 29, 1983, we informed our sales staff to cease all solicitation of orders for Donkey Kong products. We have liquidated our stock balances. As I mentioned in my last letter to you, it is our policy to refrain from selling any products to our customers if there is any question as to rights of ownership, validity of trademark, etc. The J.C. Penny Company is one of our largest customers, and our agreement with them precludes us from selling them any product involved in any litigation -- in a litigation over the rights of ownership."

Q. Will you continue.

A. "So you can see we can't market your product to our largest customers because of the existing problem between yourself and Universal studios. We cannot and will not endanger the good will between ourselves and our customers under any circumstances."

Q. Did Super Shirts after this correspondence continue to be a Nintendo licensee and sell Donkey Kong products?

A. No.

Q. Does Super Shirts still owe Nintendo royalties

under the guaranteed royalty provision of its license agreement?

A. Yes, they do. $7,302.13.

Q. Are you familiar with the company known as House Glass?

A. Yes.

Q. Was House Glass a Nintendo licensee on January 1983, January 3rd, 1983?

A. Yes.

Q. What type of products did House Glass produce under its license with Nintendo?

A. Donkey Kong mugs.

Q. Did House Glass take any action after January 1983 with respect to its any Nintendo license?

A. They ceased production.

Q. Did House Glass thereafter remit any royalties to Nintendo?

A. No.

Q. Did House Glass advise you as to why they had ceased production?

A. Because of the pendency of this litigation.

MR. KIRBY: Your Honor, this is Defendant's Exhibit 28 in evidence.

Q. Does House Glass still owe Nintendo royalties under the gauranteed royalty provisions of its license

agreement?

A. Yes.

Q. How much?

A. $14,417.28.

Q. Are you familiar with the company known as Manton Cork?

A. Yes.

Q. Was Manton Cork a Nintendo licensee on January 3rd, 1983?

A. Yes, they were.

Q. Which type of products did Manton Cork produce under its license?

A. Donkey Kong cork boards.

Q. Did Manton Cork take any action after January 3, 1983, with respect to its license?

A. They ceased production.

Q. Let me show you what is in evidence as Defendant's Exhibit 57 which is a letter from Ralph A. Manton dated September 21, 1983, to Nintendo of America. Did you see that letter, Mr. Lincoln, at or about the time it was sent?

A. Yes.

Q. Would you please read the second paragraph of that letter.

A. "As a consequence of this trademark dispute

between you and Universal, whether right or wrong, in their direct threat to charge us to a trademark infringement unless we cease and desist, they frustrated and materially interfered with our licensing agreement and exposed us to potential serious liability, loss and damage."

Q. Now, Mr. Lincoln, did Nintendo make any effort to retain Manton Cork as a licensee after it indicated it was not going forward?

A. I recall that we did. I think this fellow also wanted us to pay back the $5,000 that he had paid as an advance royalty, so I know I wrote him about that, and also asked him to continue with the license agreement.

Q. Now, Mr. Lincoln, did all of the licensees about which you have just testified refuse to pay their gaurantee royalties to Nintendo?

A. Yes.

Q. Now, did Nintendo have any program they had generally applied to try and retain these people as licensees?

A. Yes, we did.

Q. And would you describe that program.

A. Well, we tried a couple of things. We tried when we got phone calls or inquiries from licensees regarding this litigation, we tried to assure them that we were fighting these people and that we were confident that

we would win. We offered to indemnify, to give them an indemnification to the extent that we might not have already done that. We offered to extend their licenses so that they could work off their guarantees, and in general I think we tried to do everything we could.

I think the other thing we did was to try to convince them that Donkey Kong was a very popular character and that we were very positive about it and that the program was going on and that Ralston Purina had signed the license and that Donkey Kong was going to be on television as a cartoon series, this kind of thing.

Q. Let me show you what is in evidence as Defendant's Exhibit 60, which is a letter from Manton Cork to Nintendo of America dated January 30, 1984, Mr. Lincoln. Did you see that letter at or about the time?

A. Yes.

Q. It was received by Nintendo? Would you please read that to us.

A. The letter is addressed to Susan Schoenecker, licensing manager. "Ms. Schoenecker, thank you for your letter of January 16. We are not interested in renewing the contract because our program was killed as a result of Universal lawsuit and threats against us. As a consequence of those threats, all merchandise was frozen and discontinued. A report covering the activity is attached.

This has been a horrible and costly experience for us. Sincerely, Audrey Columbo."

Q. Mr. Lincoln, does Manton Cork still owe royalties under the provision of the license agreement?

A. Yes.

Q. How much does it owe?

A. $10,000.

Q. Has it refused to pay that amount?

A. Yes.

Q. Are you familiar with the company called Silva?

A. Yes.

Q. Was Silva a Nintendo licensee on January 3, 1983?

A. Yes, they were.

Q. What products did Silva manufacture under its license agreement with Nintendo?

A. To make a Donkey Kong blanket sleeper.

Q. Had Silva as of January 3, 1983 produced any product?

A. They hadn't produced any product, but they had provided Nintendo with product samples and we had given some approval -- Susan Schoenecker had given some approval to the product sample.

Q. Did Silva ever remit any royalties to Nintendo?

A. No.

Q. What is the balance owed under the guaranteed --

A. Well, that's not true, they paid the $5,000 advance, but there were no other royalties paid, and they owe us $45,000, which is the balance of the guaranteed royalty.

Q. Did they ever to your knowledge produce any products under the license, other than the prototype?

A. Not to my knowledge.

Q. Mr. Lincoln, Ralston Purina is a Nintendo licensee; is that correct?

A. That's correct.

Q. When did it become a licensee?

A. That would have been March of 1983.

Q. Does it continue to be a licensee today?

A. Yes.

Q. How much in royalties has Ralston Purina paid to Nintendo?

A. Approximately $1,375,000.

Q. Is that for the sale of any particular product or products?

A. Donkey Kong and Donkey Kong Jr. cereal.

Q. What was the period during which this license agreement was negotiated?

A. February, March of 1983.

Q. What was the royalty percentage contained in that license?

A. Three percent.

Q. Is that the standard royalty for a food product license?

A. No, that's the bottom end, as I understand it.

Q. And what is a standard royalty range for a food product license?

A. Three to six percent, in that area.

Q. Did you inform Ralston Purina of the litigation with Universal during the negotiations over the license?

A. I did.

Q. Was that Nintendo's policy with respect to potential licensees after the lawsuit was filed?

A. Yes.

Q. Were you ever informed Ralston Purina had any contact with Universal while negotiating with Nintendo?

A. Yes.

Q. To your knowledge, did Ralston Purina ever enter into an agreement with Universal similar to the Coleco agreement?

A. Not to my knowledge.

Q. To your knowledge, was execution of such an agreement requested by Universal?

A. Yes.

Q. Did Ralston Purina ever inform you why it did not enter into an agreement with Universal?



SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

A. Yes.

Q. What did they tell you?

A. They indicated that through their own in-house trademark attorney and through outside counsel that they had reviewed all of the pleadings in this case and had done quite a bit of research and homework, and that they had concluded that Universal did not have any rights in King Kong and that essentially we were going to win.

Q. You testified that in the month immediately after the institution of the litigation that you were informed that Atari had been asked to sign an agreement like Coleco's with Universal, and I believe you testified that Atari told you that it would not do so; is that correct?

A. That's absolutely correct.

Q. Did there ever come a time when you learned that Atari had in fact entered into an agreement with Universal?

A. Yes.

Q. When did that come to your attention?

A. I found out about it during this discovery in this case.

Q. Was that sometime during 1983?

A. My recollection is that at Toy Fair, which would have been February of '83, Mr. Arakawa and I had a breakfast meeting with Skip Paul, where he indicated that

Atari was getting pressured to sign an agreement or enter into an agreement similar to the Coleco agreement but that Atari was resisting the pressure. I subsequently learned that he had signed the license agreement with Universal a month before our breakfast meeting.

Q. Did you ever receive information from Atari as to why they had entered into an agreement despite what you have just testified to?

A. Yes.

Q. And what did they tell you?

A. They indicated that Universal had exerted pressure on them through their parent company, Warner Communications. I was advised by -- I was advised of that by Skip Paul.

Q. Now, you also testified that Universal had contacted Milton Bradley during the months immediately after the litigation was filed. Was Milton Bradley a major licensee?

A. Yes.

Q. Of Nintendo?

A. Yes.

Q. Could you tell me how much in royalties Milton Bradley has paid Nintendo?

A. About $300,000.

Q. Did Milton Bradley ever inform you that

Universal had been in contact with them again after the contact as to which you had previously testified?

A. Yes.

Q. How did that come to your attention?

A. I received a phone call from Mel Taft indicating Bradley's in-house attorney, Bruce Oravec, had received a letter from Mr. Fairhurst.

Q. Did Mr. Taft send a copy of that letter to you?

A. Yes.

Q. Showing you what is Defendant's Exhibit 54 in evidence, and ask you if that letter from Mr. Fairhurst to Mr. Oravec dated March 30, 1983 is the letter as to which you have just testified?

A. Yes, it is.

MR. KIRBY: Your Honor, I will not ask the witness to read this letter. It is Defendant's Exhibit 54 in evidence.

Q. Did Mr. Taft tell you what what Milton Bradley's intentions were with respect to the Universal demand contained in that letter?

A. My recollection is that he indicated that -- that they were not going to do -- enter into any kind of agreement with Universal.

Q. Now, you have also testified about negotiations with Ruby Spears. Did Ruby Spears become a licensee of

Nintendo?

A. Yes.

Q. And I believe you testified that they produced a Donkey Kong cartoon series under license with Nintendo; is that correct?

A. That's correct.

Q. Did Ruby Spears enter into an agreement with Universal similar to the Universal-Coleco agreement?

A. They entered into an agreement with Universal, yes.

Q. Do you know when they entered into the agreement?

A. My understanding was it was in March of 1983.

Q. Were you advised why Ruby Spears entered into a Coleco-type agreement with Universal?

A. Yes.

Q. What were you told?

A. I was told that there was no way that Ruby Spears was -- or that CBS was going to allow Donkey Kong cartoon series to be aired in the fall of 1983 without arrangements being made between Ruby Spears and Universal.

Q. Now, Mr. Lincoln, you have testified about seven Nintendo licensees who refused to proceed with their Nintendo licenses after January '83. To your knowledge, has any other Nintendo licensee absolutely refused to proceed with with its license, citing the Universal lawsuit

tried to reassure them. We said, "We would give you an indemnification, this is a hot property, keep trying to sell it." That was basically it. We just kept getting phone calls over the course of '82 and even into '83 from concerned licensees.

Q. Now, Mr. Lincoln, can you tell me overall what Nintendo's revenues have been from its royalties from product licensees such as the type you have been testifying about today?

A. The merchandise licenses are -- the product licenses exclusive of Ralston Purina, the total royalties to date are just a little bit over $1 million.

Q. Does that include Milton Bradley?

A. Yes.

Q. And you said Milton Bradley paid about how much?

A. $300,000.

Q. So exclusive of Milton Bradley, about $700,000; is that correct?

A. That's correct.

Q. And including -- to make sure we have these figures correct -- including Milton Bradley and Ralston Purina, what would the total revenues be?

A. No -- all right. In addition to the $1 million that I just mentioned, you've got $1,350,000 being paid by Ralston Purina. So the total royalties to date exclusive

of Coleco and Atari come to $2.3 million.

Q. In terms of video arcade game product licensing, was this a successful licensing program?

A. This was not a successful licensing program, given the enormous popularity of Donkey Kong and the popularity of video games, and in particular, Donkey Kong and Pac Man, in this period of time, '82. I concluded that it was -- or I considered that, and I think Mr. Arakawa feels the same way, that it was a disaster.

Q. How did the merchandising revenues of Donkey Kong from these product licenses of two point three-fifty, I have it, compare with the license revenues of any other video game manufacturer?

A. Pac Man's merchandise licensing revenues were about $19 million, and 60 percent of that was made in 1982.

Q. And I believe you testified previously that Pac Man was the only video arcade game more successful than Donkey Kong?

A. Yes.

Q. In terms of video arcade game sales, can you compare the two?

A. Donkey Kong sold about 60,000 uprights and tables, Pac Man about 100,000 units.

Q. Now, Mr. Lincoln, at various points in your testimony you have said that your licensees referred to a

problem of sell in to retailers. What does "sell in" mean?

A. My understanding is -- and I didn't learn this in law school, I learned it from listening to the people in the marketing department at Nintendo -- sell in is the term that they use referring to the manufacturer selling its product in to the retailer as opposed to the retailer's sale to the ultimate consumer which is called sell through.

Obviously, with these licenses, royalty licenses, the sell in is what's the key because we get -- we get the royalty based upon the sale of the sell in. The problem that we were experiencing in this whole period of time was a sell in problem, or that's not the problem we were experiencing, it was the problem our licensees were experiencing.

Q. Now, Mr. Lincoln, do you have any basis for quantifying how much the refusal of retailers to stock Nintendo products, a sell in product because of this lawsuit, has damaged Nintendo?

A. No, there is just no way to tell.

Q. Can you quantify the overall damage done to your licensing program done by this lawsuit?

A. No, I can't.

Q. Did Coleco's entry into a license with Universal have any impact on the Nintendo's licensing program?

MR. FAIRHURST: Objection.

THE COURT: Overruled.

A. Certainly.

Q. Would you testify as to what that impact was.

A. Coleco, for better or worse, was the major license. The home video business was booming, and it was -- that's the license that exposed Donkey Kong to the population at large. Obviously the arcade game did that, too, but Coleco got Donkey Kong into the homes. So they were the key licensee, they were the flagship. They were the license that we were counting on to perpetuate the merchandise licensing program. And so there was in effect --

Q. Now, you testified that Universal entered into agreements with, in addition to Coleco, Atari and Ruby Spears. Were you ever informed by any of these three licensees that they had to change their products because of some demand by Universal?

A. No.

Q. To your knowledge, did any of these licensees ever submit product samples to Universal?

A. Not to my knowledge.

Q. Did Universal to your knowledge have any control over Donkey Kong products marketed by these licensees?

A. No.

Q. To your knowledge, did Universal intervene in

any way with the marketing of Donkey Kong by these licensees?

A. No.

Q. Now, Mr. Lincoln, I failed to ask you, prior to the time that you became general counsel and executive vice-president of Nintendo, did you hold any position at Nintendo?

A. I was secretary of the corporation from February 1982.

Q. Now, Mr. Lincoln, is Donkey Kong or Donkey Kong games still -- arcade games still in the marketplace?

A. Yes. They are still out there. Our estimate -- we sold about 60,000 Donkey Kong's and about 30,000 Donkey Kong Jr.'s. So our estimate right now is that there is probably about 75,000 Donkey Kong games out there. When I say our estimate, that's the estimate of our coin-op sales people and Mr. Arakawa.

Q. Now, Mr. Lincoln, I take it you incurred attorneys' fees in connection with defense of this action by Universal against Nintendo?

A. Yes, we did.

Q. Can you give me in some round number what the attorneys' fees are that you have incurred in defense against the Universal lawsuit?

A. Up to October 4th, which was when the Court of

Appeals -- I cut it off at this point when the Court of Appeals issued its ruling -- the total fees we paid were $1,142,545.70, plus $228,752.68 in costs.

Q. Mr. Lincoln, since that time, I take it you have continued to incur attorneys' fees in connection with these counterclaims?

A. Sure.

Q. And in in connection with the prosecution of the counterclaim for copyright infringement?

A. Yes.

Q. Are you able to tell the court now what those fees are?

A. For the prosecution of the copyright?

Q. Yes.

A. No, all of the fees are not in.

Q. Mr. Lincoln, just one final question. Has Universal contributed anything to Donkey Kong's success?

A. I would say that Universal has hurt Donkey Kong.

MR. KIRBY: Your Honor, before extending Mr. Lincoln to Mr. Fairhurst, I would like to call your Honor's attention to Defendant's Exhibit 21 in evidence which is a memorandum from Stanley Newman, a senior officer of MCA, who the evidence will show is in charge of merchandising, addressed Bob Hadl and Mr. Sheinberg.

This brief memorandum reads: "While making the

began in April of 1982 and continued on through April of 1983, approximately, a little after that, the bulk of it?

A. Yes.

Q. You had 40 to 50 licensees during the course of this time?

A. Up to the time of the lawsuit.

Q. Was there of a time, Mr. Lincoln, that you had about a hundred licensees?

A. I think the -- I added them up the other day, Mr. Fairhurst. I think they come up to about 65 if you count all the licenses.

Q. Of the 65 licensees that Nintendo had during the course of its whole program with the Donkey Kong property, you have identified seven and I think your testimony what is that these are the ones that you clearly identify as having told you that the reason they were giving up their Donkey Kong license was because of the Universal claims on King Kong of which they had been apprised by virtue of a letter principally from me; is that correct?

A. That's correct.

Q. I ask you a very general question at the outset: When you received these letters and this correspondence to which you have testified about the licenses, were you skeptical about their reasons in the case of any of the seven as to why they were giving it up?

A. Was I skeptical about it?

Q. Yes. Did you accept their version of why they were giving it up?

A. I certainly did.

Q. In every case?

A. In every case. I had no reason to doubt their word. Obviously, we had received a number of letters that were all saying the same thing. Frankly, I was more concerned with the comments in these letters about the sell-in. I had hopes that we would be able to convince some of these people to keep going.

Q. Let's just start with Silver Manufacturing Company. Remember that's the company that wrote you and said they were not going to continue with their license for blanket sleepers?

A. Blanket sleepers.

Q. Okay. That license was entered into in November of 1982?

A. The document was, yes, was signed in 1982, November of 1982.

Q. Now, this was five months, November of 1982, after the lawsuit had been commenced, was it not?

A. Yes.

Q. Now, at that point had they manufactured any of those products?

A. We had been dealing with them.

Q. Can you answer my question yes or no on that one?

A. They had not manufactured any products.

Q. In point of fact they never once made a Donkey Kong sleeper, did they, whatever it is?

A. They certainly provided us with the art work.

Q. I know they gave you the art work. You said that before. They never manufactured them, did they?

A. Their letter indicates that they had progressed to the point of ordering up and producing something like 24,000. You've got the letter.

Q. I can cut through this very quickly, Mr. Lincoln.

In fact, didn't you write them on May 10, 1984, and tell them that you were through with them at that point, you were the one who was canceling the license on the basis that they were in breach of contract because they had never made the product?

A. We certainly did write them a letter in that period of time, through our attorneys, indicating that we were seeking to collect the guarantee. That's absolutely correct.

Q. You charged Silver with bad faith?

A. That was our attorney's comment.

Q. Which you don't wish to adopt at this point?

A. Which I don't wish to adopt at this point.

Q. Fair enough. I understand.

There was a statement made in one of those letters to Silver to the effect that hundreds of licensees continue to sell Donkey Kong products.

Was that also a statement that might, if you pardon me, be a little bit of hyperbole at that point?

A. I think the statement was consistent with what we have been doing. Maybe she went a little bit too far in talking about hundreds of licenses. Her point was, and it was a point that I had been trying to make to these licensees, that hey, this program still has life to it and that was the point she was making.

Q. To sum up on Silver, they never manufactured a Donkey Kong product. The license was granted in November of 1982, seven months after the lawsuit was already in existence and you wound up writing to them claiming that they were in breach because they never made the product and you had problems with them all along; isn't that so?

A. I think the correct answer is that they advised us in September of 1984 that they were not going -- they had decided not to produce the goods because of the lawsuit.

Q. Let's go on to Trim Line Sales. They paid $5,000 as a guarantee against royalities. Did you ever receive another payment from them?

A. Not that I recall.

t2

Q. And that was a license that was also entered into prior to the institution of this lawsuit, April 29, 1982?

A. That's correct.

Q. Like a lot of those licenses?

A. There were a number of them.

Q. When you said before that they still owe you $10,000, what you mean to say is they owe you the $10,000 additional guaranteed royalty. They had that guaranteed royalty of 15,000, they paid 5 when they signed the agreement and you never saw another nickel?

A. That is right.

Q. As far as you know you they never made any Donkey Kong belts?

A. Yes.

Q. The license was granted in April 1982, I wrote them, Douglas Fairhurst, in January of 1983 and in that period of approximately 10 months, 9 months, they did not make a single Donkey Kong belt.

They paid you $5,000 in royalities and that was the end of the deal?

A. That's correct.

Q. Bates Knitwear, another of the famous 7, they were licensed to sell girls sleepwear with the Donkey Kong on it, correct?

A. That's correct.

Q. And their license was granted in April 1982 as well?

A. Yes, sir.

Q. And it was supposed to expire in December of 1983?

A. Yes.

Q. Now, as I understand it, they generated approximately $12,000 in revenues during the period of time in which they were selling this product; is that right?

A. I believe that's correct. They exceeded their guarantee.

Q. Now, when you wrote them or when your lawyers did, more correctly, saying you've got this letter from Universal's lawyers, don't worry about it, we are defending the claim vigorously, the claims are meritless and we expect to prevail and so forth, when you wrote them that letter they came back with a letter, didn't they?

A. Yes.

Q. What was their first letter back; do you remember what they said?

A. My recollection is that they wrote us. We wrote a letter through our attorneys and Bates wrote back to me.

Q. And they said that they were concerned but wanted to see a financial statement, didn't they?

A. Yes, they did.

Q. To make a long story short, you refused to give them a financial statement, didn't you?

A. I gave them pertinent financial information.

Q. I know that. But you refused to give them what they wanted, correct?

A. I refused to give them a financial statement of Nintendo of America.

Q. At that point they said, forget it, if you won't give us a financial statement we won't go forward with the license?

A. They didn't say that to me. They asked us to provide a financial statement. We advised them of pertinent financial information and they -- and we also urged them, I also urged them, to continue on with the license.

Q. They declined to do so because you wouldn't give them a financial statement; they said an indemnity wasn't good enough?

A. I don't believe we received any more letters from them.

Q. They wrote to you on February 1. You wrote back to them, did you not; do you have that in front of you?

A. I did respond to this letter.

Q. That's what I am getting at.

A. Yes, I did.

MR. KIRBY: Is that marked for identification?

MR. FAIRHURST: Yes, that's Defendant's Exhibit 47.

Q. And your letter was to Mr. Dickerson on February 22, 1983, and you declined in that letter to send them the financial statement that they asked for, didn't you?

A. I advised them of our financial condition and I refused -- I told them that we do not provide that kind -- those financial statements and I gave them the name and phone number of our CPA at Coopers & Lybrand and suggested that they could talk to them if they had any questions.

Q. As of June 1982, Nintendo had an agreement with Ruby Spears; that is Exhibit 26?

A. That is not correct. The Ruby Spears agreement.

Q. Let me put in front of you a copy of the agreement, Mr. Lincoln. At the top it says as of June 25, 1982?

A. I know that it says that, Mr. Fairhurst.

Q. That's the date of the agreement as of the agreement?

A. That is not the date of the agreement. I don't know and I still don't know where this woman came up with this --

Q. I'm sorry. I can't hear what you are saying.

A. The license agreement with Ruby Spears was entered into in January of 1983. Harriet Beck, who is the attorney for Ruby Spears, had a way of dating these licenses as of this June 25, 1982. I am not -- I can't tell you why she did that. But I can tell you that we had no license with those people until January of 1983.

Q. Did you personally negotiate this license?

A. Mr. Arakawa and I both negotiated the license together and we also retained an attorney in California to assist us.

Q. And Ruby Spears subsequently went forward and developed the Donkey Kong cartoon series, did it not?

A. They did.

Q. That was broadcast on the CBS television network?

A. In September of 1983, yes, network series.

Q. Do I take it fairly that Nintendo has been paid every royalty owed onto it under this agreement by Ruby Spears?

A. Yes, that's correct.

Q. This agreement, if it's January of 83, it's serves the same point, whether it's after June it wouldn't make any difference. It was entered into and negotiated well after the lawsuit by Universal against Nintendo, correct?

A. Yes.

Q. Notwithstanding that -- look at paragraph 10 -- you gave no warrant, representation or indemnity of any kind with respect to the subject matter of Universal's claims over King Kong?

A. That's correct.

Q. If you look at paragraph 10 you left to Ruby Spears the defense and settlement of any claim against them, that was their sole responsibility, is that correct, paragraph 10, look at it.

A. Yes, that's correct.

Q. Now, I understand you to have made a statement in this litigation that it was your legal view, if you will, that because Ruby Spears subsequently signed a covenant not to sue with Universal Ruby Spears was in breach of this agreement; is that correct?

A. That's correct.

Q. So they were free, as you saw it, to defend the claim but they couldn't settle it?

A. Our position is very simple. Our position was that we had the exclusive right, title and interest in Donkey Kong and they would do nothing to impair it.

The fact of the matter is that they had to enter into an agreement with Universal. There was no other way in which that cartoon series was going to get on the air, none.

Q. You were notified by Ruby Spears of their willingness to go forward with this contract sometime before March 31, 1983, were you not?

A. They exercised their option, yes.

Q. That was exercisable as of March 1983?

A. I believe that's correct.

Q. They went ahead and they produced the program and the program was a success, wasn't it?

A. It was a success.

Q. Now, in that agreement, do you recall who owns the merchandising rights and the properties developed by Ruby Spears for the Donkey Kong television show?

A. Yes.

Q. Who owns them?

A. We do.

Q. Have you undertaken at this point to license any of those merchandising properties?

A. No, we have not. I believe, Mr. Fairhurst, that you are speaking about --

Q. Paragraph 10.

A. No, I don't think it's paragraph 10.

Q. I beg your pardon. The one preceding it.

A. 9. What I understood in our negotiations with these people was that they took the position that if they developed either new characters or if they enhanced the

value of our Donkey Kong character as a result of the cartoon series that they ought to get some kind of percentage of the extra belts and socks and T-shirts that were being sold. We said no. So we had that clause put in.

Q. You got the merchandising rights?

A. We kept them.

Q. That was a clause that you put in?

A. This was a clause that our attorney put in.

Q. He was familiar with the concept of merchandising rights, wasn't he?

A. I don't know what he was familiar with. I know what I was trying to get at and I was trying to keep these people from getting any percentage of the Donkey Kong royalities attributable to socks, T-shirts, mugs, et cetera.

Q. Now, was Ruby Spears granted ownership of the programs themselves? Let me refresh your recollection.

Look at paragraph 3.

A. It's a long paragraph.

Q. It's a very long paragraph. I am going do see if I can assist you. If I can take you down to the 12th line, starting with the words "Ruby Spears shall own in perpetuity."

A. Okay.

Q. "Ruby Spears shall own in perpetuity any and all television programs and/or feature films produced by it and

t2

the characters, stories, teleplay, musical and literary material created by Ruby Spears and all distribution and exhibition rights and any program or film produced by it."

Do you see that?

A. Yes, I do.

Q. This agreement bears a signature of an authorized representative of Nintendo, does it not?

A. Yes, it does.

Q. Now, turn to the copyright clause, paragraph 7. Tell us how the copyright was divided?

A. Copyright notice in the name of Nintendo.

Q. Not withstanding is that Ruby Spears shall be the sole owner of the products produced hereunder including but not limited to all programs and film negatives and any certificate of copyright registration shall reflect the existence of the agreement between us and our ownership of the produced product.

So Ruby Spears kept ownership of the film product itself, Nintendo has the merchandising rights in the underlying characters developed from it. Now, this was entered into before anyone had the benefit of Judge Sweet's thinking on this. Doesn't it strike you -- and this is argumentative and they can object if they want -- you split the rights, didn't you?

MR. KIRBY: We'll object, your Honor.

THE COURT: Overruled.

A. There's no question there was some division of the rights.

Q. Okay. There's no question pending to you.

A. All right.

Q. Has Nintendo taken any characters developed by Ruby Spears on that program?

A. No.

Q. Incidentally, when you testified on direct examination that these revenues from Coleco and Atari and from all these other licensees, we said 17.3 and you gave a figure of $2.3 million, excluding the Atari and Coleco and you said Nintendo. Were you including both Nintendo U.S. and Nintendo Japan?

A. Yes.

Q. I thought you were. I wanted to be absolutely certain of that.

Q. With respect to to any of these licensees, obviously, you have no claim against the two that didn't sign. The seven that you testified to on your direct examination of the 40 that you claim gave up a license because of something Universal did. Has Nintendo brought legal action against any of them?

A. Of those seven?

Q. Yes.

A. No.

Q. Just so we are clear on this: Nintendo takes the position in its briefs and so forth filed in this action that Coleco breached its agreement in some way.

Has Nintendo put Coleco on written notice of a breach of agreement?

A. There was no written notice.

Q. Has Nintendo sued Coleco?

A. No.

Q. Has Nintendo put Atari on written notice of breach?

A. Well, we are suing Atari.

Q. Not because of the Universal agreement. So, in other words, you have a lawsuit going with Atari over royalities because they have not paid you?

A. That's correct.

Q. You have not in that lawsuit made a claim against them because of this alleged breach you referred to?

A. That is correct.

Q. Is this this federal court?

A. In federal court in San Jose.

Q. You are the plaintiff, not the defendant, in the lawsuit?

A. We are suing on two licenses that they have breached.

Q. Let's turn to one of the other licensees that Mr. Kirby asked you some questions about. This is Houze of Glass. As I understand it, you have received a total of $5,582 dollars from this licensee and they were licensed in April 1982; is that correct?

A. Yes.

Q. 5,000. The first payment was the advance against royalities and I presume that the second payment of 582 dollars, which was in February of 1983 -- excuse me. That's not right -- August of 1982 was their actual sales above the 5,000?

A. That's right.

Q. Now, they were another company that I wrote to in January of 1982 and I am going to put in front of you Defendant Exhibit 28 and ask you if that's the sum and substance of your correspondence with that company.

A. That's correct.

Q. They simply said they didn't want to be bothered, in the substance of it, we have no knowledge of the particulars of the pending litigation, not in a position to assess its possible outcome or its impact on the proposed addendum and by the proposed addendum that was an indemnification you were then extending them?

A. Yes. They said, accordingly, we do not presently intend to continue to sell any of the designs

involved until we can be sure this matter is resolved.

Q. But the point is at that point they had returned in royalities approximately $582 above the guarantee; is that correct?

A. Absolutely.

Q. Turning to Milton Bradley, Mr. Kirby put some questions to you and I think he used the word contacted, Universal contacted them. Do you remember the questions and his choice of the words?

A. Yes.

Q. Universal contacted them.

Isn't it your understanding, in point of fact, Milton Bradley happened to have been at Universal on other matters entirely when this matter came up?

A. Yes. They were in Mr. Adler's office which is three floors down and in a different department from Mr. Hadl's.

Q. Universal didn't go out and contact them, they happened to be there and at that point they raised the question?

A. That's correct. Universal also contacted them in March of 1983 as well as January of 1983.

Q. As I understand it, the Milton Bradley people never negotiated any license with Universal?

A. That is correct.

A 000284

obtained papers from the suit in California, which Universal had been involved in some seven or eight years before.

Q. Can you identify that California litigation any better, Mr. Forsman?

A. The California litigation was a suit captioned Universal City Studios versus RKO General and others.

Q. Do you know what that lawsuit involved?

A. That suit was, from the papers I reviewed, a declaratory judgment action which sought to -- it sought a declaratory judgment that Universal had the right to make a King Kong movie, a subsequent King Kong movie.

Q. And did you conduct any other investigation Mr. Forsman?

A. I got a search from the U.S. Patent and Trademark Office and when I found out about the lawsuit I got a search of King Kong marks from the U.S. Patent and Trademark Office and I had a law firm in Washington also do a search in the records of the copyright office to see who owned King Kong.

Q. During the course of your investigation, Mr. Forsman, did it come to your attention or were you aware that various Nintendo licensees had been threatened by Universal?

A. Yes.

A. She said that I seemed to have more knowledge about it than she did but that she went on I think fortuitously to say that Universal had a pretty bad reputation out on coast as being very litigious and that despite the fact that she didn't believe they had any rights they were going to enter into a license with Universal because Universal had that lot of power out in this town is the way she put it.

Q. As a result of your investigation, Mr. Forsman, did you come to any conclusion with respect to the Universal's claims?

MR. FAIRHURST: I object to that.

THE COURT: Overruled.

A. I was convinced in my own mind that they did not have rights sufficient to preclude our introduction of a Donkey Kong cereal.

Q. And--

A But that was a tentative conclusion.

Q. Did you take any other steps to firm up this tentative conclusion, Mr. Forsman?

A. Yes. We arranged for a meeting with Universal City Studios. Have in mind by now we had gotten most of our information from, as far as the suit was concerned, Nintendo's side and we wanted to see if there was something to be said from the other side.

Q. Do you know when that meeting was set up or when was that meeting was set up?

A. On the 28th of February in 1983.

Q. Who attended that meeting on behalf of Ralston Purina?

A. There was a Mr. William Clagget who is an advertising division vice-president. There was a Mr. Stanley Rea, who was a division counsel, for the grocery products of Ralston Purina and there was a Mr. Gensamer who was a division vice-president in charge of grocery products marketing.

Q. And did you yourself attend that meeting?

A. Yes, I did.

Q. Who attended on behalf of Universal?

A. Mr. Stanley Newman, who I was led to believe was a vice-president at Universal and a Mr. Robert Hadl who I was told was a lawyer.

Q. Approximately, how long did this meeting last, Mr. Forsman?

A. About an hour.

Q. Can you tell us how the meeting commenced?

A. Well, the meeting commenced with Mr. Clagget's saying that we were -- our companies had had a good relationship and that we had done business before in that we had sponsored some television programs that they had

produced and that we were about to embark on a project of selling a product under the Donkey Kong name and we understood that there had been some litigation involving that and we wanted to see if we could resolve whatever differences or head off wnatever differences we might have amicably.

Q. Did you advise Mr. Hadl and Mr. Newman about the conclusions you had reached as a result of your independent investigation of their claims?

A. Yes, I did.

Q. Do you recall whether Mr. Hadl or Mr. Newman responded?

A. Well, I told Mr. Newman -- I was looking more at Mr. Newman -- that I had done an investigation and from everything that I had learned they didn't seem to have any rights. But since I had only heard one of the story I was going to give them an opportunity to give me their side of the story.

Q. Do you recall whether they responded?

A. Mr. Newman said that he had indicated before we had the meeting that he didn't want to talk about the lawsuit. I believe that about that time he said if you came out here to talk about that you have wasted your time.

Q. Did you press your inquiry as to the rights they were claiming?

A. Yes. I pressed my inquiry to the point of obvious agitation. I constantly pressed the matter. I characterized the suit in California as a suit that they had won and now they turned on its head and were taking the position that what they had argued they didn't have they now had and I thought it was extraordinary and maybe they could tell me they had something more. But from what I had seen they didn't have anything.

Mr. Newman at that time was resisting and telling me he didn't want to talk to me about it.

Q. Do you recall any specific comments he told you?

A. Well, he said if you want to know what our position is on the suit read the pleadings and talk to Mr. Fairhurst.

Q. Was Mr. Sheinberg mentioned during this discussion?

A. Yes, he was.

Q. In what connection?

A. I was denegrating their legal position. Mr. Newman mad a comment about Mr. Sheinberg, a lot of people didn't think Mr. Sheinberg could pull off the Sony Betamax case which they had by that time won and that a lot of people had thought that he couldn't, you know, that -- the implication was that he had taken some longshots and had won on them and the tenor and implication of all the

conversation was if you don't deal with us we'll do a job on you too.

Q. Did they tell you that Mr. Sheinberg was a lawyer?

A. Yes.

Q. Was Coleco mentioned during this discussion?

A. Coleco and Atari were mentioned. Newman indicated that there had been a -- they had deals with Coleco and Atari and they were on the verge of having to deal with somebody else. We got into a discussion about what kind of deal we might be able to work out with them and it seemed to me from the tenor of the conversation that if we entered into a deal similar to Coleco's we would be okay.

Q. Did Universal state anything about a claim of right in Donkey Kong?

A. Mr. Newman had one point. I said, look, maybe we can approach this thing on the basis if you think you have a case and I think you don't and maybe we can do it on the basis of we will pay you a license royalty until you lose the case and then you pay us back or if you win the case you keep the money. The answer was, oh, well, we are not interested in that and if we win the case we'll own Donkey Kong.

Q. Did the subject of a possible King Kong come up

at all in the discussion?

A. At one point Mr. Gensamer had asked Mr. Newman whether or not Universal would be willing to grant a King Kong license.

Q. Was there a response?

A. The response was you mean Donkey Kong. Gensamer said, no, I mean King Kong. Newman said, come on, nobody wants King Kong.

Q. Did there come a time in the meeting when Ralston proposed an agreement to settle the matter?

A. Yes, at one point Mr. Rea handed Mr. Newman a document that we had prepared prior to the trip.

Q. Mr. Forsman, I'll show you Defendant's Exhibit 37 in evidence and ask you do you recognize that.

A. Yes, I do.

Q. Is this the proposed agreement that was given to Universal at that meeting?

A. This is a copy of that agreement with some notations that I think were not on it originally.

Q. Who was given this agreement from Universal?

A. I believe Mr. Rea gave it to Mr. Newman.

Q. Did Mr. Newman review this agreement?

A. Yes, he did.

Q. Did Mr. Newman comment on it?

A. He read down until he got to the consideration,

which was $1 and he kind of snickered and made some comment about, you know, you have to be kidding. One dollar, what do you mean one dollar.

Q. Did he express any further interest in this arrangement?

A. He read beyond that where it said other good and valuable consideration and we started discussing what that might be.

Q. Did you discuss with him the factors which would influence the determination of the amount of that other good consideration?

A. All the while I was discussing whether or not he had something to sell us and whether or not, you know, there was anything of value. There was some discussion of this. There was certain nuisance suit value in the thing and we might be prepared to pay some small amount. Our preference would be to pay a lump sum rather than in effect a royalty.

Q. What was the discussion, if any, about a continuing royalty as opposed to a lump sum payment?

A. Well, they were really against the lump sum idea. But they, you know, they would entertain -- I think this may have been the point where they decided well, we'll go talk to Mr. Sheinberg and see what he thinks about it.

Q. Before we get to the discussion with Mr.

Sheinberg, I believe you testified that Coleco and Atari were mentioned during this discussion; is that correct?

A. Yes.

Q. Did they tell you that Coleco and Atari had entered into licenses?

A. They said Coleco and Atari had entered into agreements that provided percentage royalities and that's the kind of thing they were looking at.

They also said, when I said, you know, that you don't have a case, they said, well, you must be a lot smarter than those guys because they thought we had a case enough to enter into these agreements with us.

Q. Now, Mr. Forsman, did there come a time during the meeting when Mr. Newman and Mr. Hadl left the room?

A. Yes.

Q. Did they tell you why?

A. Well, I think -- and my recollection is not perfect, because it's been a long time. I think they went up to discuss the various business deals that could get us out of this situation and I think they were primarily discussing whether we would go with the straight royalty. I have no knowledge, of course, of what they discussed other than what I have read in depositions in this case.

Q. Did they tell you that they were going to have this discussion with Mr. Sheinberg?



SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

A. Yes.

Q. For how long were they gone?

A. Probably 15 or 20 minutes.

Q. Did they both return together?

A. I believe they did, yes.

Q. When they returned, how long did the meeting last after that?

A. Not very long, probably 10 minutes, five or ten minutes.

Q. Was, at that point, the subject of a continuing royalty versus a lump sum payment discussed further?

A. I believe they said that Mr. Sheinberg was not interested in a straight lump sum royalty. The whole topic didn't really die at that point. There was some discussion about a further meeting or further discussions. We were running out of time. Apparently, Mr. Newman had an appointment he had to go to.

Q. Did he advise you that he had this other appointment when he returned from his meeting whether Mr. Sheinberg?

A. It was after he returned from the meeting. I don't know if it was directly after.

Q. Do you recall anything else about the substance of the discussion after they returned from their meeting with Mr. Sheinberg?

A. There were a lot of discussions. There were business discussions going on and I was still talking about the legal rights and Mr. Hadl and Mr. Rea got into a discussion about the legal rights and I kind of chimed into that discussion.

Q. Do you recall any specific comments Mr. Hadl made?

A. Mr. Hadl said, in substance, that they would sue us if we went on and marketed Donkey Kong without entering into a deal with them and that they would not be as lenient with us as they might be on other people because we knew better. We were, in effect, wilful infringers and is that they would seek a preliminary injunction and --

Q. Excuse me.

A. Yes.

Q. After the meeting concluded did you and Mr. Gensamer and Mr. Clagget and Mr. Rea have occasion to discuss what had transpired?

A. Yes.

Q. Did you come to a conclusion as to what Univesal's intentions were at that point?

A. Yes.

Q. What did you believe that to be?

A. My conclusion was that they would sue us if we didn't enter into an arrangement with them.

that marketing commence?

A. It commenced in April of 1983.

Q. In Ralston Purina's view, was marketing of Donkey Kong cereal a substantial success?

A. It was a substantial success for the kind of product it was.

Q. What do you mean for the kind of product it was?

A. It's a licensed product and licensed products follow fads. So if you have a licensed cereal that does well for a year and a half or so you have done well with it and that's what this product did.

Q. Since the introduction of the Donkey Kong cereal in April 1983 has Ralston Purina heard anything further from Universal City Studios?

A. No.

Q. Mr. Forsman, did you prepare a written statement for submission to the court in connection with this action?

A. Yes.

Q. Did you swear to the contents of that statement?

A. Yes.

Q. Mr. Forsman, I'll show you what has been marked and it is marked I believe now as Defendant's Exhibit 101 for identification and ask you if that's your statement?

A. Yes, it is.

Q. Do you still swear to the contents of this



SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. – 791-1020

statement?

A. Yes, I do.

MR. GALLATIN: Your Honor, I offer defendants' Exhibit 101 for identification into evidence.

THE COURT: Admitted.

(Defendant's Exhibit 101 for identification was received in evidence)

MR. GALLATIN: Mr. Fairhurst.

MR. FAIRHURST: Over objection.

CROSS-EXAMINATION

BY MR. FAIRHURST:

Q. Mr. Forsman, did I understand you to say that you had read the deposition testimony of Mr. Hadl or Sheinberg or both?

A. I read the deposition -- the portion of the deposition testimony that referred to the meeting in Mr. Sheinberg's office.

Q. That's where you got the information to which you have just testified; is that correct?

A. No, it's not.

Q. What was the occasion--

A The information that I got -- I didn't testify as to what was said in that deposition. I will be happy to tell you what I read.

Q. No. I think the deposition speaks for itself.

Nintendo -- the position they had taken in the litigation, did you not?

A. Yes, I did.

Q. You asked for that?

A. Why yes, I did.

Q. And I assume you also wanted to know what arguments they were going to making on various points?

A. Yes.

Q. And at the told you?

A. Yes, they did.

Q. Would it be fair to say, so we don't have to go through the whole thing, as far as you could determine, you got a fairly good and substantial briefing on Nintendo's position in the lawsuit as it was then in February of 1983?

A. I got that and more.

Q. And more. You were aware, were you not, that Nintendo was then in the process of preparing a motion for a summary judgment; is that correct?

A. I was told that, yes.

Q. You knew what arguments they were going to making, you knew everything about their case except you did not know it as well as Mr. Kirby and his colleagues; you knew what their position was in spades?

A. They were not holding back anything from me.

Q. Absolutely. They gave the full, full story?

A. Absolutely.

Q. Every single thing you wanted?

A. They did.

Q. You did what you should do, you did your own independent search by going through the files in the copyright office and trademark office?

A. Yes, I did.

Q. You have this reservoir of knowledge and you call Universal up, call them up, and say I would like to hear your side of story?

A. Somebody else in the company called them up.

Q. They said, sure, come on out and talk to us, correct?

A. Yes.

Q. You ended up up there?

A. Yes.

Q. There were four of you, two lawyers, yourself and Mr. Rea?

A. Yes.

Q. Two division vice-presidents of Ralston Purina?

A. Yes.

Q. The four of you went rushing in and went to see Mr. Stanley Newman and Mr. Robert Hadl?

A. Yes.

Q. As I understand your direct testimony, you

MR. FAIRHURST: I wanted to establish that he was familiar with the concept than his own client, Ralston Purina had a successful case or was in the process of winning one?

A. I was the attorney in the chase.

Q. I appreciate you were. I wouldn't ask the question if I didn't think you were.

Notwithstanding your conclusions and all of this about Universal's position and Donkey Kong with an infringement, you went ahead with a product in the market, you wound up offering $100,000?

A. Yes.

Q. Or a royalty, one way or the other?

A. Right.

Q. As I understand it, you said that was, in your judgment, a commercial consideration based on not having to worry about putting executives up for deposition and you were also concerned about a preliminary injunction?

A. Well, yes. We were afraid of the effect on the trade of a preliminary injunction. We were afraid of the disruption of the selling with a preliminary injunction. We certainly didn't want a lawsuit right at the time we were introducing a product.

Q. At that point you knew, did you not, that Universal's lawsuit had been brought in June 1982 and here

we are all way around and we are talking about events now in February and March of 1983, and Universal had never applied for a preliminary injunction and there was no threat that Universal would apply for one?

A. Mr. Hadl had suggested they would against us. Mr. Hadl had suggested as we were walking out of the meeting that they would seek preliminary relief against under the circumstances.

Q. Do you recall what the guaranteed royalty payable to Nintendo under your agreement was, the guaranteed royalty?

A. I believe it was $100,000.

Q. Over what period, what's the term?

A. The term was five years and it's $100,000.

Q. For the five year period?

A. Yes.

Q. You were offering Universal $100,000 for a covenant not to sue in essence and that was your document?

A. Excuse me. I misunderstood the question. I thought you were talking about the Donkey Kong agreement.

Q. $100,000 guaranteed royalty over five years?

A. Yes, that's right.

Q. You were offering Universal back in March 1983 $100,000 to settle a claim?

A. Yes.

Q. If they would have taken it on a lump sum basis?

A. Yes.

Q. You are offering Universal $100,000, whereas for five years that would have been the minimum royalty to Nintendo?

It's a fact, isn't it?

A. It's a fact. There's a reason for the fact.

Q. At some point before you went to visit Universal -- and I believe the meeting was on February 28, 1983; is that correct?

A. Yes.

Q. At some point before that visit, did you advise Nintendo or its lawyers that you were going to be making that visit to Universal?

A. Yes, we did.

Q. When you came back, as it were, from that meeting, did you report back to Nintendo's lawyers the sum and substance of what had occurred?

A. I believe we did.

Q. Did you tell Nintendo's lawyers that you went to the meeting with covenant not to sue agreement in hand?

A. I can't remember. There would not have been any reason not to tell them.

Q. Was it your understanding that your covenant not to sue was to be the settlement of a potential claim by

lawsuit. That's all we were thinking about.

MR. FAIRHURST: No further questions.

THE COURT: Redirect

REDIRECT EXAMINATION

BY MR. GALLATIN:

Q. Mr. Forsman, Mr. Fairhurst asked you about when you had seen Mr. Sheinberg's deposition?

A. Yes.

Q. You told him I believe you saw it just yesterday?

A. I saw it yesterday.

Q. Do you recall that before you prepared your sworn statement that has been submitted to the court in this case that I came down to see you in St. Louis?

A. Yes.

Q. Do you recall my showing you part of Mr. Sheinberg's deposition that reads as follows:

"Q. Are you aware of any discussions between Universal and Ralston Purina with respect to Donkey Kong?

"A. Yes.

"Q. Tell me what you were aware of.

"A. A couple of my associates, namely Mr. Newman and Mr. Hadl, advised me that three or four lawyers in Ralston Purina came to visit us looking for what amounted to a covenant not to sue and they related to me that these people were prepared to make a modest flat sum

payment in exchange for a general covenant not to sue for a product which was not disclosed and the meeting lasted 20 seconds. I said that is the most stupid thing I every heard of. Throw them out of the building I don't want to hear about it any more and that was the end of that conversation."

Do you recall my showing you that part of Mr. Sheinberg's deposition?

A. Yes, I do. I believe that's the same part that I saw in Mr. Kirby's office yesterday as well.

MR. GALLATIN: Thank you, Mr. Forsman.

THE COURT: Thank you, sir.

(Witness excused)

THE COURT: Tomorrow morning at 9:30. Thank you all.

(Adjourned to 9:30, May 21, 1985)



SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020